

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In reply refer to:
1800B3-AJS

December 19, 1996

David D. Oxenford, Esq.
Fisher, Wayland, Cooper, Leader & Zaragoza, L.L.P.
2001 Pennsylvania Avenue, NW
Washington, D.C. 20006

In re: WHET(FM), Birnamwood, Wisconsin
Application to Replace Expired Permit
File No. BPH-960327JB

Application for Minor Modification
File No. BMPH-960502IB

Dear Mr. Oxenford:

This is in reference to the above-captioned applications: (1) to replace expired construction permit (BPH-960327JB); and (2) to make minor changes to the proposed facilities of unbuilt FM station WHET(FM), Birnamwood, Wisconsin (BMPH-960502IB), filed on behalf of Lyle R. Evans, d/b/a Pacer Radio of Mid-Wisconsin ("Pacer"). A petition to cancel the construction permit and a "formal objection" to the minor change application have been separately filed by Mark Heller ("Heller"). See Footnote 1. Pacer has filed oppositions to each of Heller's filings. For the following reasons, we deny Pacer's replacement application, dismiss as moot its minor change application, cancel the construction permit and delete the WHET(FM) call sign. We also dismiss as moot Heller's petition to cancel and "formal objection."

Background. The original construction permit (BPH-920512MB) for WHET(FM) was granted on July 15, 1993, to expire on January 15, 1995. On January 17, 1995, Pacer filed an application for extension of time to construct (BMPH-950117JD). Pacer contended that it had made "substantial progress" towards the construction of the station. Specifically, it claims that it had: (1) completed 80% of its studio; (2) acquired a used transmitter; (3) tuned the transmitter to the authorized frequency; and (4) "rendered" the transmitter operative. Pacer further indicated that all that remained was completion "of the antenna/transmission facility and installation of the remaining studio technical equipment." Pacer also asserted that construction had not been completed because of reasons beyond its control, *i.e.*, that its authorized transmitter site was no longer available. Pacer indicated, however, that it would be filing a modification application within sixty days and that it would have the station operational within 120 days following grant of its modification application.

By letter dated October 12, 1995, the staff denied an objection filed by Heller and granted the extension request based on Pacer's representation that it had made substantial progress. In granting the extension request, the staff made no mention of Pacer's loss of its transmitter site for reasons allegedly beyond its control. The construction period was extended to expire on March 12, 1996. However, no modification application was filed during the extended construction period.

On March 27, 1996, two weeks after the extension permit expired, Pacer filed the above-referenced replacement application. See Footnote 2. In this application Pacer outlines the same progress specified in its January 17, 1995 extension application and repeats its contention that its authorized site is unavailable. Pacer adds that it had not been able to find a suitable site and file an modification application because "severe winter weather" and "significant snow cover" prevented it from obtaining soil samples needed to determine whether the potential sites could support its antenna/tower structure. Pacer also repeats that the new station would be operational in fewer than 120 days following grant of its yet-to-be-filed modification application. On May 2, 1996, Pacer filed a minor change application to relocate the WHET(FM) tower.

Discussion. An application to replace an expired construction permit must satisfy the requirements of 47 C.F.R. § 73.3534(b) by showing: (1) that construction is complete and testing is underway; (2) that substantial progress toward completion of construction has been made; or (3) that no progress has been made for reasons clearly beyond the control of the permittee and the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction. The Commission has clearly announced that these criteria will be applied strictly. *Construction of Broadcast Stations*, 102 FCC 2d 1054 (1985). In evaluating an applicant's showing, the Commission places the burden on the permittee to demonstrate that it has satisfied one of the three Section 73.3534(b) criteria during the most recent construction period. See *Deltaville Communications*, FCC 96-343, released September 12, 1996, (citing *Carolyn S. Hagedorn*, 11 FCC Rcd 1695, 1696 (1996) (applicant must make specific and detailed showing or bear fully the risk that its showing will be found inadequate)). Further, extension requests are evaluated based upon events that occurred during the most recent construction period. See *Panavideo Broadcasting, Inc.*, 6 FCC Rcd 5259, 5259 (1991); and *Rainbow Broadcasting Company*, 11 FCC Rcd 1167 (1995). See Footnote 3.

Pacer fails to show that an extension is warranted. It has not demonstrated that it made substantial progress during the extended construction period. All "actual construction" appears to have been undertaken during the original construction period. Pacer also has not shown that delays occurring during the extended construction permit were attributable to circumstances clearly beyond its control. Pacer simply relies on the same circumstance that allegedly prevented it from constructing in the first place - the loss of its transmitter site - and supplements this unsubstantiated assertion with a general statement that severe winter weather, coupled with significant snow cover, prevented it from proceeding with construction. However, the Commission has treated general allegations of routine winter weather conditions as foreseeable circumstances that do not warrant further extensions of time, especially in the absence of a showing that diligent efforts were made throughout the construction period. Cf. *Benko Broadcasting Company*, 5 FCC Rcd 1301 (MMB 1990) (extension granted where significant part of tower erected and substantial funds expended, despite weather-related delays).

Even assuming that the continued inability to proceed with construction was due to causes beyond its control, an extension would be warranted only if Pacer has demonstrated that it took all possible steps to expeditiously resolve its problems and proceed with construction during the most recent construction period. *Kin Shaw Wong*, FCC 96-365, [11 FCC Rcd 11928], released September 25, 1996, citing *Carolyn S. Hagedorn*, 11 FCC Rcd 1165 (1996). However, Pacer has not provided the Commission with any such showing. It has not documented when it first contacted potential site owners, nor when it initiated steps to obtain soil samples. Pacer has also failed to provide any documentation that it had entered into a lease agreement with a new site owner during the extended construction period.

In sum, Pacer has not demonstrated that substantial progress has been made in the construction of the WHET(FM) facilities. It also has not shown that factors clearly beyond its control prevented it from proceeding with construction. Having failed to satisfy the strict requirements of Section 73.3534, no further extension or replacement application is warranted. Since we are denying Pacer's extension application, its modification application is dismissed as moot.

Accordingly, the application filed by Lyle R. Evans, d/b/a Pacer Radio of Mid-Wisconsin Co. to replace the expired construction permit (BPH-960327JB) IS DENIED and the application to make minor changes to the proposed facilities of unbuilt FM station WHET(FM), Birnamwood, Wisconsin (BMPH-960502IB) IS DISMISSED, the WHET(FM) construction permit (BPH-920512MB) IS CANCELLED, and the WHET(FM) call sign IS DELETED. Further, the informal objections filed by Mark Heller ARE DISMISSED as moot.

Sincerely,

(Peter H. Doyle for)

Linda Blair, Chief
Audio Services Division
Mass Media Bureau

cc: Mark Heller
Lyle R. Evans

Footnotes:

Footnote 1: Heller's "petition" and "formal objection" are treated as informal objections since applications for extension of time to construct and for minor changes are not subject to petitions to deny. *See* 47 C.F.R. § 73.3584(a) and 47 U.S.C. § 309(c)(2)(d). As a result of the actions taken in this letter decision, we need not address the other issues raised by Heller.

Footnote 2: Extensions of time to construct are limited to a period of no more than six months from the date of grant. 47 C.F.R. § 73.3534(d). In this case, the extension period was set to expire five months from the grant date, on March 12, 1996, and not on April 12, 1996.

Footnote 3: The Commission has broad discretion in determining whether or not substantial progress toward completion of construction has been made, or whether the circumstances alleged to have prevented construction constitute circumstances beyond the control of the applicant. *See New Orleans Channel 20, Inc. v. FCC*, 830 F. 2d 361, 365 (D.C. Cir. 1987).